

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

KM1 and KM2, minor children and their
adoptive parents and guardians, TM and
MM,

CIVIL DIVISION

CASE NO.: CACE 18-016496

Plaintiffs,

v.

CHILDNET, INC. and NATIONAL YOUTH
ADVOCATE PROGRAMS, INC. and
KIDS IN DISTRESS, INC.,

Defendants.

**DEFENDANT, KIDS IN DISTRESS, INC.'S MOTION TO DISMISS COUNT XIII OF
PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendants, KIDS IN DISTRESS, INC. (hereinafter "KIDS"), by and through its undersigned counsel, and pursuant to the Florida Rules of Civil Procedure hereby files this **Motion to Dismiss Count XIII of Plaintiffs' First Amended Complaint for Intentional Breach of Fiduciary Duty with prejudice**, and as grounds states as follows:

1. On February 26, 2019, Plaintiffs filed their First Amended Complaint ("FAC") against the above named Defendants.¹
2. By way of background, this is a child welfare litigation matter in which the minor Plaintiffs, KM1 and KM2, along with their adoptive parents, MM and TM, allege that they were harmed as a result of the negligence of the agencies that provided services to them between 2015 and 2017.

¹ KIDS concurrently and timely filed an Answer and Affirmative Defenses denying the allegations contained in Counts X and XI of the FAC.

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3. Pursuant to the First Amended Complaint, Plaintiffs allege that KIDS provided therapeutic services to KM1 while he was in Defendant NYAP's foster home and provided "Adoption Related Services" to KM1, KM2, TM, and MM. See FAC at ¶ 13-14.

4. Accordingly, Plaintiffs have alleged the following causes of action against KIDS arising from these therapeutic services: Count X for Negligence on behalf of KM1, Count XI for Negligence on behalf of KM2² and Count XIII [sic]³ for Intentional Breach of Fiduciary Duty on behalf of all KM1, KM2, TM and MM.

5. In support of its "Intentional Breach of Fiduciary Duty" cause of action, Plaintiffs' claim that "[p]ursuant to [KIDS'] statutory and contractual obligations to the Plaintiffs and the therapist-patient relationship that had been created, there existed a relationship of trust and confidence between KIDS and the parties whereby KIDS owed the [P]laintiffs a fiduciary duty to the [P]laintiffs to act with good faith and honesty towards the Plaintiffs." FAC at ¶ 4, p. 49. Plaintiffs go on to state that "KIDS breached its fiduciary duty to KM1, KM2, MM and TM" for, in sum, failing to provide adequate therapeutic treatment.

6. However, Plaintiffs' fiduciary duty claim must be dismissed because Plaintiffs' allegations simply do not amount to the breach of loyalty, good faith, fair dealing, or candor required to sustain a claim for breach of fiduciary duty. See, e.g., *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 520 (Fla. 3d DCA 1994). There is no duty (regardless of a fiduciary relationship) by a psychotherapist to a patient regarding the provision of therapy services. Instead, the extent of any fiduciary relationship between a psychotherapist and her patient concerns the professional's duty to disclose material information related to the patient. See *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). Plaintiffs cannot survive dismissal

² See footnote 1.

³ Plaintiffs' FAC mistakenly numbered the twelfth count in the complaint as "Count XIII".

by merely labelling the relationship between Plaintiffs and KIDS as “fiduciary” or by referring vaguely to a “fiduciary duty . . . to act with good faith and honesty” without any identifying a specific, cognizable duty on the part of KIDS.

7. Accordingly, because Plaintiffs have failed to properly allege a cause of action for intentional breach of fiduciary duty against KIDS, Count XIII should be dismissed with prejudice.

MEMORANDUM OF LAW

I. Motion to Dismiss Standard

A motion to dismiss pursuant to Florida Rule of Civil Procedure 1.140(b)(6) tests the legal sufficiency of a complaint to state a cause of action. *Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006); *Gann v. BAC Home Loans Servicing LP*, 145 So. 3d 906, 908 (Fla. 2d DCA 2014); *Bilbrey v. Myers*, 91 So.3d 887, 890 (Fla. 5th DCA 2012). In determining whether the plaintiff has stated a cause of action, the plaintiff’s allegations are reviewed in light of the applicable substantive law. See *Peeler v. Indep. Life & Acc. Ins. Co.*, 206 So. 2d 34, 36 (Fla. 3d DCA 1967) (citations omitted).

The complaint must “plead all facts establishing an entitlement to relief with more than ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action.’” *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “The complaint must contain enough facts to make a claim for relief plausible on its face.” *Resnick*, 693 F.3d at 1324-25. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

II. Plaintiffs have failed to allege that KIDS breached any fiduciary duty recognized by Florida law.

“A fiduciary relationship is based on trust and confidence between the parties.” *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 540 (Fla. 5th DCA 2003). In accordance with the relationship of trust and confidence, “[a] fiduciary owes to its beneficiary the duty to refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts.” *Capital Bank*, 644 So. 2d at 520 (citing *Pepper v. Litton*, 308 U.S. 295 (1939)). The telltale sign of a breach of fiduciary duty is “some benefit flowing to the [fiduciary] as a result of the breach.” See e.g., *Atlantic Nat. Bank of Fla. v. Vest*, 480 So. 2d 1328, 1333 (Fla. 2d DCA 1985). Accordingly, in order to state a claim for a breach of fiduciary duty, the complaint must include: (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) that breach must be the proximate cause of the plaintiff’s alleged injuries. See *Gracey*, 837 So. 2d at 353.

Pursuant to Count XIII of their First Amended Complaint titled “Intentional Breach of Fiduciary Duty,” Plaintiffs claim in conclusory fashion that:

[p]ursuant to [KIDS’] statutory and contractual obligations to the Plaintiffs and the therapist-patient relationship that had been created, there existed a relationship of trust and confidence between KIDS and the parties whereby KIDS owed the [P]laintiffs a fiduciary duty to the [P]laintiffs to act with good faith and honesty towards the Plaintiffs.

FAC at ¶ 4, p. 49.

Plaintiffs go on to allege that KIDS breached this nebulous “fiduciary duty . . . to act with good faith and honesty” because:

KIDS should have known that its conduct, specifically, its complete failure to refer KM1 for a psychosocial evaluation, its failure to provide adequate therapeutic treatment, its failure to recommend that [Defendant] CHILDNET provide a safety plan, and its failure to advise TM and MM of KM1’s extensive history, which resulted in a child-on-child incident in the home and destabilization of the adoptive placement was substantially certain to result in injury to the parties.

Id. at ¶ 6, p. 49.

However, Plaintiffs cause of action fails as a matter of law because there is no Florida case law holding that a psychotherapist owes a “general” fiduciary duty to a patient regarding the provision of therapy services. Instead, the extent of any fiduciary relationship between a psychotherapist and her patient concerns the professional’s duty to disclose material information related to the patient. See *Gracey*, 837 So. 2d at 353 (married couple sued their psychotherapist for breach of fiduciary duty for revealing confidential information to third parties). In *Gracey v. Eaker*, the Florida Supreme Court held that based on the **specific** and **narrow** statutory confidential relationship between the patient and therapist created under Fla. Stat. § 491.0147⁴, it would allow the breach of fiduciary duty claim to proceed against the psychotherapist. *Gracey*, 837 So. 2d at 353 (“Florida courts have previously recognized a cause of action for breach of fiduciary duty in different contexts **when a fiduciary has allegedly disclosed confidential information** to a third party.”). Notably, however, the Court did **not** find a blanket “professional duty” that allowed a patient to sue his psychotherapist for any actions whatsoever that he disagreed with or which he alleged caused him to suffer damages. *Id.*

Here, there are no allegations contained within the four corners of Plaintiffs’ complaint that KIDS disclosed any confidential information that violated Plaintiffs’ trust or confidence. See e.g., *Barnett Bank of Marion County, N.A. v. Shirey*, 655 So. 2d 1156 (Fla. 5th DCA 1995) (plaintiff entitled to damages for breach of fiduciary duty because bank employee disclosed sensitive financial information to a third party); *Leblanc v. Acevedo*, 258 So. 3d 555 (Fla. 5th DCA 2018). Furthermore, even if a breach of fiduciary duty with respect to psychotherapists were expanded beyond disclosure of confidential information, Plaintiffs have failed to identify any specific, cognizable duty on the part of KIDS recognized by the courts in Florida in their complaint. See, e.g., *Elkind v. Bennett*,

⁴ Fla. Stat. § 491.0147 provides that: “Any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential.”

958 So. 2d 1088, 1092 (Fla. 4th DCA 2007) (a party alleging a breach of fiduciary duty must establish “what confidence was breached and how its disclosure damaged” the client). In other words, Plaintiffs’ allegations fail because the fiduciary duties recognized by Florida law (i.e., “the duty refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts”) do not include the general tort duties involved in provision of adequate therapy services. See *Capital Bank*, 644 So. 2d at 520. Plaintiffs’ allegations that KIDS owed “fiduciary duties” as outlined in paragraph 6 are legal conclusions that are contrary to the law, and this Court is not obligated to accept Plaintiffs’ erroneous legal conclusions at the motion to dismiss stage. See *Response Oncology v. MetraHealth Ins. Co.*, 978 F. Supp. 1052, 1058 (S.D. Fla. 1997) (holding that “Courts . . . need not accept . . . conclusory allegations . . . or mere legal conclusions asserted by a party” at the motion to dismiss stage).

Furthermore, none of the acts alleged by Plaintiffs underlying their breach of fiduciary duty claim evidence any of the requisite “intentional” or “deliberate” conduct on the part of KIDS. In cases involving a breach of fiduciary duty, the respective defendants typically engaged in deliberate self-dealing or betrayals of trust that caused some benefit to flow to the defendants. See, e.g., *Capital Bank*, 644 So. 2d at 520 (holding bank breached its fiduciary duties to client by “taking unfair advantage of and not acting in the best interest of” client and by “not disclosing the nature of the appraisal upon which” client relied); *Treco Intern. S.A. v. Kromka*, 706 F. Supp. 2d 1283, 1288 (S.D. Fla. 2010) (holding that employer stated claim for breach of fiduciary duty where it alleged former employees committed disloyal acts during their employment in anticipation of future competition). The First Amended Complaint, at best, alleges only omissions of KIDS, not overt, deliberate actions meant to subvert the alleged psychotherapist-patient fiduciary relationship with Plaintiffs. Likewise, Plaintiffs fail to allege that KIDS received any benefit from the alleged acts, a typical feature of any breach of fiduciary duty. In sum, Plaintiffs’ allegations simply do not amount to the breach of loyalty, good faith, fair dealing, or candor required to sustain a claim for breach of fiduciary duty. Instead, Plaintiffs have merely

rephrased their claim for negligence as a duplicative breach of fiduciary duty claim.⁵ Accordingly, because Plaintiffs have failed to (nor can they) allege that KIDS breached an existing, specific fiduciary duty, Count XIII should be dismissed with prejudice.

III. Conclusion

Plaintiffs have wholly failed to present any allegations which indicate KIDS breached their “fiduciary duty” to Plaintiffs. Florida's recognized fiduciary duties do not include general tort duties relating to the provision of therapy services. Merely labelling a relationship as “fiduciary” does not establish a legal duty in tort. Furthermore, Plaintiffs’ allegations that KIDS committed negligence by omission, even if true, do not evidence the self-dealing, disloyalty, bad faith, or lack of candor that constitutes a breach of fiduciary duty. As such, for the reasons set forth above, Count XIII should be dismissed with prejudice.

WHEREFORE, Defendant, KIDS IN DISTRESS, INC., respectfully requests that this Honorable Court grant its Motion to Dismiss, enter an Order dismissing Count XIII of Plaintiffs’ First Amended Complaint with prejudice, and for any and all other relief deemed just and proper.

⁵ Courts routinely hold that where a patient’s claim that the doctor (in this case, psychotherapist) breached his fiduciary duty arises from the same operative facts and results in the same injury as another claim asserted against the doctor, then the breach of fiduciary duty claim is duplicative and should be dismissed. See *Neade v. Portes*, 193 Ill. 2d 433, 445, 739 N.E. 2d 496, 250 Ill. Dec. 733 (Ill. 2000) (cited by *Greenberg v. Miami Children’s Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (breach of fiduciary claim dismissed because duplicative of the claim of informed consent regarding failure to inform of financial arrangement with HMO)); see also *Hales v. Pittman*, 118 Ariz. 305, 309, 576 P.2d 493, 497 (1978); *D.A.B. v. Brown*, 570 N.W.2d 168 (Minn. App. 1997); *Garcia v. Coffman*, 1997 NMCA 92, 124 N.M. 12, 19, 946 P.2d 216, 223 (App. 1997); *Moguls of Aspen v. Faegre & Benson*, 956 P.2d 618 (Col. App. 1997) (“In the present case, we find that [the client] has not plead [sic] a cause of action for breach of fiduciary duty distinct from the alleged malpractice case still pending in the trial court. A duplicative count may be properly dismissed.”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2019, a true and correct copy of the foregoing was filed with the Clerk of Broward County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to the following parties registered with the e-Filing Portal system: Jason A. Glusman, Esq. and Carlos A. Garcia, Esq., Wicker Smith O'Hara McCoy & Ford, P.A., ftlcrtleadings@wickersmith.com, 515 E Las Olas Blvd Ste 1400, Fort Lauderdale, FL 33301, (954) 847-4800, Attorney for Defendant, **National Youth Advocate Programs, Inc.**, Renee Gomez, Esq. and Maritza Pena, Esq., Marlow, Adler, Abrams, Newman & Lewis, rgomez@marlowadler.com; bzamora@marlowadler.com; nvaldesrecio@marlowadler.com 4000 Ponce de Leon Blvd., Suite 570, Coral Gables, FL 33146, (305) 446-0500/(305) 446-3667 (F), Attorney for Defendant, **Childnet, Inc.**, Howard M. Talenfeld, Esq. and Maha A. ELKolalli, Esq., Talenfeld Law, howard@justiceforkids.us; lisa@justiceforkids.us; brianna@justiceforkids.us, 1776 N. Pine Island Road, Suite 222, Plantation, FL 33322, (754) 888-5437, **Attorney for Plaintiffs.**

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